(1)

Supreme Court, U.S.
FILED

03-28 JUL 1 2003

OFFICE OF THE CLERK

In the

Supreme Court of the United States

CECIL R. ARNOLD,

Petitioner,

v.

RAYONIER, INC.,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD D. PHILLIPS
Counsel of Record
Georgia Bar No. 576600
Post Office Box 69
Ludowici, Georgia 31316-0069
Telephone: 912/545-2191
Facsimile: 912/545-2505
Attorney for Petitioner

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦USSCINFO.COM

39 pp

QUESTIONS PRESENTED

1. Is it error for the District Court and the Court of Appeals (11th Circuit) to hold as a matter of law that it is not a violation of the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* ("ADEA") for the Defendant Rayonier to refuse to consider a highly qualified individual for employment because he was not in the limited pool of individuals they would allow to apply for vacant positions although the Plaintiff was an individual who was intended to be protected the by Age Discrimination in Employment Act (51 years of age)?

2. Is it error for the District Court and the Court of Appeals (11th Circuit) to hold that the Defendant Rayonier was entitled to a judgment as a matter of law in Plaintiff's Age Discrimination in Employment Act case because the Court held that Arnold could not prove his prima facie case because Rayonier failed to fill the job with a younger applicant but left the job vacant? Is Plaintiff required to prove that a younger individual was hired as an essential element of his case or can he proceed where his application is rejected and the job is still vacant? Plaintiff Arnold was 51 years of age, highly qualified for the position, suffered adverse action because Defendant Rayonier refused to accept his application or consider him for employment. (See McDonnell-Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973). Also see Reeves v. Sanderson Plumbing Products, Inc., 530 U. S. 133, 120 S. Ct. 2097, 2109, 147

L.Ed.2d 105 (2000), which approved the elements in McDonnell-Douglas v. Green, Supra,

3. The Age Discrimination in Employment Act is an Act to prevent the Employer from rejecting the applicant because of his protected age. Is the employer prohibited from: limiting, segregating, or classifying his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age? (See 29 U.S.C. §623 (a)(2)).

PARTIES TO THE PROCEEDING

Petitioner (Plaintiff): Cecil R. Arnold
Respondent (Defendant): Rayonier, Inc.
Honorable Anthony A. Alaimo, Judge
United States District Court

Guy O. Farmer, II, Attorney for Defendant

Forestal Rayonier Chile, Ltd.

The Honorable James E. Graham, United States Magistrate Judge for the Southern District of Georgia

Holland and Knight, LLP, Attorney for Defendant

Joseph C. Kitchings, Attorney for Plaintiff

New Zealand Timberlands Limited

Richard D. Phillips, Attorney for Plaintiff

Phillips and Kitchings, Attorney for Plaintiff

PPP Asset Co. Limited

RayAd, Inc.

Rayland Company, Inc.

Rayonier Canada Ltd.

Rayonier China Limited

Rayonier CNI Limited

Rayonier De Mexico, S. A. de C.F.

Rayonier Far East Ltd.

Rayonier Financial Services (U.K.) Ltd.

Rayonier Foreign Sales Corporation

Rayonier Forest Management, Inc.

Rayonier Forest Resources Company

Rayonier, Inc.

Rayonier, Industries, Ltd.

Rayonier International Financial Services Limited

Rayonier New Zealand Limited

Rayonier New Zealand Services Company

Rayonier Northland Limited

Rayonier NZ Holdings Limited

Rayonier NZ Management Limited

Rayonier NZ MDF Ltd.

Rayonier Products and Financial Services Company

Rayonier Pulp Distribution Corp.

Rayonier Singapore Limited

Rayonier Timberlands Holding Corporation

REMI Environmental, Inc.

RLA Trading Corporation

Southern Wood Piedmont Company

Taiga Ltd.

Taylor, Odachowski & Sperry, LLC, Law Firm of
Local Counsel for Defendant/Appellee
The Rayonier Foundation

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDINGS iii
TABLE OF AUTHORITIES vii
OPINIONS BELOW 1
JURISDICTION 3
RELEVANT PROVISIONS INVOLVED 4
STATEMENT 7
REASONS FOR GRANTING THE WRIT 14
CONCLUSION 23
APPENDIX
Circuit Court Decision 1a
District Court Decision 6a
Order Denying Rehearing 8a

TABLE OF AUTHORITIES

CASES

McDONNELL-DOUGLAS v. GREEN, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973) ..... PASSIM

O'CONNOR v. CONSOLIDATED COIN CATERS CORPORATION, 116 S.Ct. 1307, 517 U.S. 308, 134 L.Ed.2d 433 ..... PASSIM

REEVES v. SANDERSON PLUMBING PRODUCTS, INC., 530 U. S. 133, 120 S. Ct. 2097, 2109, 147 L.Ed.2d 105 (2000) 2, 13, 14, 23

REGULATIONS

28 U.S.C. §1254(1) 4, 7

29 U.S.C. §621 ..... PASSIM

28 U.S.C. §623 ..... 6, 14, 22

28 U.S.C. §631 5

28 USC §1254 4

IN THE
SUPREME COURT OF THE UNITED STATES

CECIL R. ARNOLD,

Petitioner,

vs.

RAYONIER, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Cecil R. Arnold, Petitioner, by undersigned counsel, under appropriate rules of this Court, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

This is a Complaint alleging age discrimination and retaliation by Rayonier, Inc. (Rayonier) against Cecil R. Arnold. (Arnold). The action began when Arnold filed his Complaint against Rayonier in the United States District Court, Southern District of Georgia, Brunswick Division alleging age discrimination against Arnold (51 years of age) and for retaliation because of a complaint for age discrimination based upon his termination in September, 1996 from his foreman position (salaried) after over 27 years of service with Rayonier. Rayonier responded to the

Complaint and after discovery moved for summary judgment upon the grounds Arnold could not make out a prima facie case because the last position denied Arnold was not filled but remained vacant.

Arnold responded and showed that Rayonier had refused to accept his applications for employment and refused to consider him for employment in any one of five vacant positions for which he was qualified from December 21, 1999 to February 20, 2001, with the last position of Machine Finishing Supervisor being left open after Rayonier rejected all applicants they considered. The District Court granted Rayonier's summary judgment upon the ground that since Rayonier did not fill the last vacancy with a younger applicant Arnold could not make out a prima facie case of age discrimination. Arnold pointed out that under McDonnell-Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973); Reeves v. Sanderson Plumbing Products, Inc., 530 U. S. 133, 120 S. Ct. 2097, 2109, 147 L.Ed.2d 105 (2000) which approved the elements in McDonnell-Douglas v. Green, supra, and O'Connor v. Consolidated Coin Caters Corporation, 116 S.Ct. 1307, 517 U.S. 308, 134 L.Ed.2d 433, that illogical variations were not a part of a prima facie case. Arnold appealed to the Eleventh Circuit Court of Appeals, which affirmed the judgment of the District Court. The Court of Appeals held, as did the District Court, that Arnold failed to establish "a prima facie case of age discrimination because the undisputed evidence showed that Rayonier never permanently filled the 2001 position." The Court of Appeals opinion further held "Rayonier proffered a legitimate non-discriminatory reason for not hiring him – namely, that it was only considering current Rayonier employees for the 2001 position -." Arnold filed his Petition for Panel Rehearing and Rehearing En Banc on February 17, 2003, and the

Court of Appeals denied the Petition for Rehearing or Rehearing En Banc on April 2, 2003.

Citations of the official and unofficial reports of the opinions and orders entered in the case.

The opinions and orders are not published. See the Order of the District Court dated June 26, 2002 granting Defendant's Motion for Summary Judgment (P.6a–7a), the Judgment of the Eleventh Circuit Court of Appeals dated January 28, 2003 (P.1a–5a). (Arnold v. Rayonier, Inc., 61 Fed. Appx. 671 (Table), 2003 WL 346870) and the Order from the Eleventh Circuit Court of Appeals dated April 2, 2003 denying Arnold's Petition for Rehearing and Petition for Rehearing En Banc (P.8a) (Arnold v. Rayonier, Inc., 192 F.3d 132 (Table)).

BASIS FOR JURISDICTION

(i) The Judgment of the District Court was entered and filed on the 26th day of June, 2002.

The opinion of the Eleventh Circuit Court of Appeals was entered and filed on the 28th day of January, 2003.

This Petition is not filed under this Court's Rule 11.

(ii) The opinion of the Eleventh Circuit denying Petitioner's Petition for Rehearing and Rehearing En Banc was entered and filed on the 2nd day of April, 2003. There has not been any order granting an

extension of time to file this Petition for Writ of Certiorari.

(iii) Not Applicable.

(iv) 28 U.S.C. §1254(1)

(v) Not Applicable.

The jurisdiction of this Court is invoked under 28 USC §1254 (1).

THE RELEVANT STATUTES INVOLVED

1. The Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*

"§621. Congressional statement of findings and purpose.

(a) The Congress hereby finds and declares that –

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice,

and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."

2. 28 U.S.C. §631 (a) – which sets the age limits for application of this statute.

"§631. Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age."

3. 28 U.S.C. §623 (a)(1) and (2) – Unlawful Employer Practices.

"§623. Prohibition of age discrimination.

(a) Employer practices

It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive <u>any individual</u> of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age" (Emphasis added).

STATEMENT OF THE CASE

This is a Petition under 28 U.S.C. §1254(1) for a Writ of Certiorari to correct the erroneous rules of law pronounced in Arnold's Age Discrimination in Employment Action, 29 U.S.C. §621, *et seq.* The jurisdiction in the District Court was based on the fact that this action was brought based upon a Federal Statue, to wit: 29 U.S.C. §621.

This is an appeal from the Judgment of the District Court granting Defendant's Motion for Summary Judgment on Arnold's ADEA case. (R-3-29 and R-3-31). Plaintiff is Cecil Ray Arnold (Arnold). The Defendant is Rayonier, Inc. (Rayonier). The evidence shows that Arnold worked for Rayonier for over 27 years and over 20 years he was a foreman in the finishing room. During that time he supervised up to 30 employees. (R-2-22 – Affidavit of Cecil Ray Arnold, Exhibit 1) In addition, he was familiar with the warehouse operation and from time to time handled foreman duties there, and was also familiar with the machine room, which adjoined the finishing room. (R-2-22 – Affidavit of Cecil Ray Arnold, Exhibit 1).

Thereafter, on December 21, 1999, Arnold received a job posting showing that Rayonier had a vacant supervisory position described as Area Manager, Warehouse in the Machines, Finishing, Warehouse. Because of his past employment, training and experience at Rayonier, Arnold was imminently qualified for this position. (R-2-22, Affidavit of Cecil Ray Arnold, Exhibit 1).

Arnold secured an application form and attempted to apply for this position. Rayonier then advised Arnold that they would not accept his application nor consider him for employment since he

was not a current employee of Rayonier. (R-2-22, Affidavit of Cecil Ray Arnold, Exhibit 1) and (Deposition of Jennifer Johnson, page 13). At that time, Mr. Tom Norton (Norton) was the Director of Human Resources. The Department of Human Resources at Rayonier had an Employee Referral Program known as H.R. Practice 4.0 which would pay any Rayonier employee $500.00 as incentive for recommending a qualified person not employed by Rayonier for employment when the person was hired for the position. (R-2-22, Exhibit 6 – Deposition of Tom Norton, Exhibits 1-6 attached to the end of the deposition). This incentive was used to locate qualified personnel from outside the employees of Rayonier. The job vacancy announcements posted and informally distributed each had this reference to H.R. Practice 4.0 promising to pay any Rayonier employee $500.00 for recommending a qualified candidate to Rayonier to fill the vacancy if he or she was ultimately hired. The announcement said to contact Jennifer Johnson (Johnson) as the Human Resources contact regarding this job vacancy. (R-2-22, Exhibit 6, Deposition of Tom Norton, Exhibits 1-6 attached to the end of the deposition).

Although this job vacancy announcement had no limitations to "in house" employees and contained the reference to H. R. Practice 4.0 which refers exclusively to non-employed candidates, Rayonier refused to allow Arnold to apply for the vacancy and refused to consider Arnold for employment. (R-2-22, Affidavit of Cecil Ray Arnold, Exhibit 1). This vacancy was filled by Bruce Woodard, a significantly younger individual. (R-2-22, Affidavit of Cecil Ray Arnold, Exhibit 1 and R-2-22, Affidavit of Julian Jackson, Exhibit 2). Norton acknowledged that Arnold appeared to be qualified for the position and he was not passed over because of his

lack of qualification for the job. (R-2-22, Deposition of Tom Norton, pages 16 and 17, Exhibit 6).

On August 8, 2000 Rayonier posted a job vacancy announcement for a Finishing Production Planner. Arnold received a copy of the job vacancy announcement and he was well qualified for this position since it dealt with the needs of the machines/finishing area where he worked for over 20 years. When Arnold contacted Johnson at the Human Resources Department she again advised Arnold that he was not eligible and they would not consider him for employment. Rayonier then filled the vacancy with Earl Dent who was less qualified than Arnold and 15 years younger. (Affidavits of Cecil Ray Arnold, Exhibit 1, and Julian Jackson, Exhibit 2). Rayonier would not consider Arnold's qualifications for the job and would not allow Arnold to submit an application for the position.

On October 30, 2000, the Area Manager Warehouse was again vacant and the job vacancy announcement was posted. Arnold again contacted Johnson and was advised he was not eligible to apply and Rayonier refused to consider his application for employment.

On January 31, 2001, Rayonier posted a job vacancy announcement for the position of Machines/Finishing Shift Supervisor. This job was virtually identical to the job held by Arnold for over 20 years as Shift Supervisor over the Finishing Department. (R-2-22, Deposition of Cecil Ray Arnold, Exhibit 1 and Deposition of Julian Jackson, Exhibit 2). Arnold again contacted Johnson who advised that he was not eligible to apply for this position. Since the announcement had the H. R. Practice 4.0 language and there was no restriction on the announcement to present employees,

Arnold had one copy of his application hand delivered to Johnson by Gleason Copeland, a long time employee of Rayonier, together with a recommendation in compliance with H. R. Practice 4.0 and Arnold also mailed one copy by certified mail. (R-2-22, Affidavit of Cecil Ray Arnold, Exhibit 1, R-2-22, Affidavit of Gleason Copeland, Exhibit 3)

Norton, the H. R. Director, acknowledged he was aware of Arnold's applications and requests for consideration for employment and admitted that Rayonier would not accept Arnold's application for employment since he was not a current Rayonier employee. (R-2-22, Deposition of Tom Norton, Exhibit 6, pages 15-17) On the Machines/Finishing Shift Supervisor position, Rayonier interviewed several "in house" employees but was not satisfied with any of them; therefore, Rayonier did not fill the position. Rayonier still, however, refused to consider Arnold's application for employment in this position. While Rayonier refused to consider Arnold for employment they were continuing to search for a qualified candidate for the vacancy and the position has been vacant since January 31, 2001. (R-2-22, Exhibit 7, Scott Deposition, page 50)

Arnold shows that this shows a pattern of illegal discrimination from December 21, 1999 to the present. The Court should consider this as a continuing act of discrimination and consider his rejection for every position in the pattern to show the pattern of discrimination.

The District Court and the Eleventh Circuit Court of Appeals limited the consideration of discrimination to the last position, to-wit: Machines/Finishing Shift Supervisor which was posted on January 31, 2001 and

refused to consider the prior acts of discrimination. (R-3-29 and 31). In addition, the District Court and the Court of Appeals refused to consider the discrimination against Arnold for the position of Machines/Finishing Shift Supervisor and held that Arnold could not prove a prima facie case since he could not prove that the position which was vacant was filled by a significantly younger individual since it is still open. (R-2-22, Affidavit of Cecil Ray Arnold) (P.6a-7a District Court Order)(P.1a–5a Eleventh Circuit Court of Appeals Order). The evidence shows that significantly younger individuals are being trained for the position by "setting up" other employees.

The evidence shows that the proffered reason by Rayonier that they were limiting their consideration of eligible candidates to fill the job vacancies announced to current employees was false and pretextural since Arnold and Julian Jackson (Jackson), the Union President listed nine salaried employees who were hired from outside the current employment pool during the same time Rayonier was refusing to accept or consider Arnold's application for employment into any salaried position. (R-2-22-Exhibits 1 and 2 – Affidavits of Arnold and Jackson).

In addition, the evidence showed that the very announcement posted showed it was not limited to a certain class of people and it offered to reward employees for recommending non-employed candidates to Rayonier for the position posted. (R-2-22, Deposition of Tom Norton, Exhibit 6, pages 15-17).

The actions of Rayonier through contact with Jennifer Johnson established a pattern of rejection of Arnold's applications and a refusal to consider him for any position advertised. (R-2-22, Exhibit 1, Affidavit of

Cecil Ray Arnold) (R-2-22, Johnson Deposition, Exhibit 5, pages 9-11) (R-22-22 Exhibit 6, Deposition of Tom Norton, page 12) (R-2-22, Exhibit 7, Scott Deposition, page 50).

Plaintiff shows that the job vacancy announcements were informally distributed by informal postings at the Jesup Mill for all employees to see and in addition the news of the vacancies announced by the Mill was distributed by word of mouth. On the nine (9) salaried positions filled from outside employees during this time, Rayonier would not consider Arnold for employment.

Norton admitted in his deposition that their practice was not in keeping with their job vacancy announcements. (R-2-22 Exhibit 6, Deposition of Tom Norton, page 12).

Jennifer Johnson, who was the contact person in the Human Resources Department, was familiar with Arnold from previous litigation over the 1996 R.I.F. and knew Arnold's age, to-wit: 51. As a long time Human Resources Services Manager Jennifer Johnson was familiar with the H. R. Practice 4.0 that was on the job postings and the awards for referrals. (R-2-22, Johnson Deposition, Exhibit 5, pages 9-11).

The District Court and the 11th Circuit Court of Appeals held that Arnold could not make out a prima facie case of discrimination because the evidence showed, without dispute, that the January 2001 position was not filled by a younger individual since the position was still vacant and that proof that Rayonier filled the position with a younger individual was an essential element of Arnold's A.D.E.A. claim.

The Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* is a remedial statute to protect citizens who have traditionally been the victims of age discrimination. These rights should not be abrogated by any Panel and certainly not by an erroneous ruling contrary to the framework established by this Court. Under McDonnell-Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973) and Reeves v. Sanderson Plumbing Products, Inc., 530 U. S. 133, 120 S. Ct. 2097, 2109, 147 L.Ed.2d 105 (2000) a prima facie showing does not require that Arnold prove that Rayonier filled the position with a younger applicant as held by the District Court and the Eleventh Circuit Court of Appeals. McDonnell-Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973) 411 U. S. 792, 93 S.Ct recognizes as the fourth element that the position remained unfilled. Reeves v. Sanderson Plumbing Products, Inc., 530 U. S. 133, 120 S. Ct. 2097, 2109, 147 L.Ed.2d 105 (2000) approved the elements listed in McDonnell-Douglas v. Green, Supra. That is exactly what Arnold proved in this case. The rules should not be changed without notice. Reeves v. Sanderson Plumbing Products, Inc., 530 U. S. 133, 120 S. Ct. 2097, 2109, 147 L.Ed.2d 105 (2000) shows further that even the ultimate fact of discrimination may be inferred from the false proffered reason by Defendant. This rule also controls the case and was ignored by the Panel. The application of the rules handed down by the Supreme Court should be followed and uniform and the Court should correct this error. The various Courts of Appeals appear to have corrupted the ruling over the years as to their elements of a prima facie case and have engrafted onto the elements holding that the position must be filled by an individual outside the protected class or that the position must be filled not still vacant contrary to McDonnell-Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973) and Reeves v. Sanderson

Plumbing Products, Inc., 530 U. S. 133, 120 S. Ct. 2097, 2109, 147 L.Ed.2d 105 (2000). (See also O'Connor v. Consolidated Coin Caters Corporation, 116 S.Ct. 1307, 517 U.S. 308, 134 L.Ed 2d. 433).

The District Court did not consider the continuous refusal of Rayonier to accept Arnold's applications or consider him for any of the salary positions that came up from December 21, 1999 to the time of the filing of this Complaint as a continuing act of discrimination or retaliation.

The District Court then granted Defendant's Motion for Summary Judgment upon the grounds Arnold could not establish a prima facie case since he could not prove that Rayonier hired a significantly younger person in the position.

Arnold shows that the judgment granting Rayonier's Motion for Summary Judgment and the erroneous opinion of the Eleventh Circuit Court of Appeals should be reversed and remanded to correct these errors.

REASONS FOR GRANTING WRIT

As set out in the Age Discrimination in Employment Act, 29 USC 623, et. seq., Congress recognized the problems created by age discrimination and the devastating toll on the individual and society. It has long been apparent that the Age Discrimination in Employment Act, 29 USC §621, et seq., is not a favorite of the District Courts or the Circuit Courts of Appeals. Most of the ADEA cases are decided for the employer on motion for summary judgment and the Circuit Courts of Appeal summarily affirm the District Court.

The decisions of this Court interpreting and setting the parameters to establish a prima facie case are quickly eroded by the lower Courts and again and again the Applicants for employment have to come back to this Court to direct the Circuit Courts of Appeals. The leading case, which sets the framework to follow in Title VII cases and age discrimination cases is McDonnell–Douglas v. Green, Supra. The four part frame work to establish a prima facie case as set out by McDonnell-Douglas v. Green, Supra is (i) that he belongs to a racial minority (protected group); (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."

We respectfully submit that under the McDonnell-Douglas v. Green, Supra framework, Arnold made out a prima facie case when he presented evidence that (1) he belonged to the protected class, to-wit: 40 to 70 years of age; (51); (2) that he applied for and was qualified for a job for which the employer was seeking applications; (3) that, despite his qualifications, he was rejected; and (4) that, after his rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualifications. Under McDonnell-Douglas v. Green, Supra actual employment of a younger person is not an element of the prima facie case.

Most cases arise under McDonnell-Douglas v. Green, 411 U. S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973), where the Plaintiff must show by circumstantial evidence that he is the victim of age discrimination.

Direct evidence of age discrimination is a rare item since the captains of industry are not stupid.

In this case the District Court and the Court of Appeals (11th) appear to be again departing from the rulings of this Court in this case and fail to recognize the elements of a prima facie case under McDonnell-Douglas vs. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973).

The first question requires us to examine the intent of Congress when they passed the Age Discrimination in Employment Act, 29 USC §621, et seq. and what evil were they correcting? 29 USC §621 (a) provides:

1. The Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*

> "§621. Congressional statement of findings and purpose.
>
> (b) The Congress hereby finds and declares that –
>
> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice,

and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

The Act is passed to protect individuals aged 40 and above. 29 USC §621, et. seq. In this case, Rayonier showed a pattern of discrimination by refusing to accept Arnold's application for any of the vacant salaried position and they refused to consider him for employment into any of the positions. Rayonier contends they have a right to avoid considering Arnold for employment by limiting the pool of individuals they will consider to their current employees.

We point out that Congress provided "It shall be unlawful for an employer

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age" (Emphasis added).

The Act protects "any individual". It does not appear that Congress intended to allow an employer to limit the pool of applicants they consider for employment to a certain group and thereby deny the protection against age discrimination to the balance of the public.

This Court pointed out that "the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the Plaintiff is a far more reliable indication of age discrimination than is the fact that the Plaintiff was replaced by someone outside the protected class." O'Connor v. Consolidated Coin Caterers Corp. 116 S.Ct. 1307, 517 U.S. 308, 134 L.Ed. 2d 433.

It appears that O'Connor holds that it is not a fact of the McDonnell-Douglas v. Green, Supra elements of a prima facie case that the successful candidate for employment be outside the protected class and such illogical standard established by the District Court and

Court of Appeals was reversed because it departed from the standards established by this Court.

We submit that the standard adopted by the District Court and the Eleventh Circuit Court of Appeals is even more illogical, to-wit, ADEA discrimination is not shown because Arnold does not belong to the pool from which Rayonier would consider applications. The establishment of a private pool of individuals from whom Rayonier will accept applications has nothing to do with whether Rayonier is discriminating against Arnold because of his age. This standard should not be allowed to stand any more than the illogical standard in O'Connor v. Consolidated Caterers Corp., Supra.

29 USC §621 shows that Congress recognized that it was necessary to pass remedial legislation to protect all individuals in the work force from age discrimination. Why should Rayonier not be allowed to limit the pool of prospective employees to a small group such as their current employees?

1. The Age Discrimination in Employment Act was passed to protect all citizens and to allow them to be judged on their ability not arbitrary age limits. By limiting the pool of applicants, Rayonier denies most citizens the protection of this remedial act.

2. Employees of Rayonier do not have equal bargaining power. If they are discriminated against, could a current employee demand his rights without jeopardy to their job?

3. Because of past discrimination, racial minorities, women and older individuals are more likely to be under represented in the pool of current employees. If the employer can now limit the pool of applicants to be considered, this creates a built in discrimination.

We respectfully submit that this Court should issue its writ to correct this problem and restore the protection of the Age Discrimination in Employment Act to all citizens not just a limited few selected by the employer. This case takes on greater importance because the guidelines in the ADEA cases, the Title VII cases and ADA cases are used interchangably.

The second question deals with what is a Plaintiff required to show to establish a prima facie case of age discrimination. Arnold showed he was 51 years of age and therefore in the protected category, that he was well qualified in that he held virtually the same job for over 20 years with very good evaluation until his termination in a R.I.F. 4 ½ years before, that he suffered adverse action in that Rayonier would not allow him to apply for any of the vacant salaried positions nor consider him for employment and that Rayonier did not permanently fill the position but left it vacant from January, 2001 to the time of hearing. (All present employees were rejected and Arnold was not considered.)

The District Court and the 11th Circuit Court of Appeals held that Rayonier's Motion for Summary Judgment was correctly granted because Arnold could not make out his prima facie case because he could not prove that the position was permanently filled by a younger individual.

The elements for a Plaintiff to show a prima facie case are set in the leading case of McDonnell-Douglas v. Green, 411 U. S. 792, 93 S. Ct. 1817, 36 L.Ed. 668 (1973). Under McDonnell-Douglas v. Green, Supra, this Court has held that a Plaintiff can make out a prima facie case by circumstantial evidence by proof: (1) That he is in the protected category; (2) That he suffered adverse action; (3) That he was qualified for the position sought; and (4) That the position was vacant and candidates of Plaintiff's skills were still being sought.

These were the elements Arnold provided; however, the District Court and the 11th Circuit Court of Appeals held that Arnold failed to make out a prima facie case because he did not prove that Rayonier filled the position with a younger individual. This Court has previously acted to correct the erroneous opinion of the Court of Appeals. In O'Connor v. Consolidated Coin Caterers Corp. 116 S.Ct. 1307, 517 U.S. 308, 134 L.Ed. 2d 433, it was determined that the District Court and the Court of Appeals dismissed Plaintiff's case upon the basis that he could not prove a prima facie case because the individual hired was also in the protected group, that is 40 years of age and the Plaintiff was 52 years of age. This Court had to point out that the ADEA did not require that the Plaintiff be replaced by someone out of the protected group. The statute protects the public from discrimination because of their age and it is not an element required by the statute nor by the guidelines of this Court that the position be filled to make out Plaintiff's prima facie case. See McDonnell-Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d. 668 (1973) and O'Connor v. Consolidated Coin Caters Corporation, 116 S.Ct. 1307, 517 U.S. 308, 134 L.Ed. 2d 433.

Plaintiff clearly made out a prima facie case and the opinion of the District Court and the Court of Appeals are erroneous and depart from the law and the holdings of this Court. This Court should issue its writ of certiorari to the Court of Appeals and again establish the correct criteria to apply.

The third question raises the issue of whether Rayonier's action in segregating and classifying its employees as the sole pool of applicants it will consider "deprive or tend to deprive any individual of employment opportunities". 29 USC §623 (a) (2) (emphasis added). Rayonier admitted that it would not accept Arnold's application nor consider him for employment no matter what his qualifications were because they limited the applicants they would consider for the salaried jobs to the pool of current employees.

Arnold shows that this practice is illegal since it deprived him and all other interested individuals of the opportunity to be considered for employment. This Court should issue its Writ of Certiorari to the 11th Circuit Court of Appeals to correct this Order, which approves this procedure by Rayonier.

CONCLUSION

An employer should not be allowed to limit the pool of applicants it will consider for employment because it deprives the working public of the protection of the Age Discrimination in Employment Act. If racial minorities, women, handicapped individuals or older workers are under represented in a particular company or industry, such a limitation would build in and perpetuate discrimination in all of these areas because the rulings in one area is applied in the others.

The ruling that Arnold could not make out a prima facie case of age discrimination because Rayonier left the position open and did not permanently fill it is incorrect and is a departure from the McDonnell-Douglas v. Green, supra, frame work. (See also Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S. Ct. 2097, 2109, 147 L.Ed.2d 105 (2000) and O'Connor v. Consolidated Coin Caterers Corporation, 116 S.Ct. 1307, 517 U.S. 308, 134 L.Ed. 2d 433).

The action of Rayonier in segregating and classifying its employees as the sole source they will accept applications from and consider for employment deprives Arnold of the right to seek employment. (See 29 §USC 623 (a) (2).

The Court should again correct and clarify the Age Discrimination in Employment Act by issuing its Writ of Certiorari to the 11th Circuit Court of Appeals

(Any footnotes trail the end of each document.)
NO. 02-14127
NON-ARGUMENT CALENDAR

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CECIL R. ARNOLD,
Plaintiff-Appellant,

v.

RAYONIER, INC., and JOHN DOE, INC.,
Defendants-Appellee.

Appeal from the United States District Court for the Southern District of Georgia

(January 28, 2003)

Before ANDERSON, DUBINA and BLACK, Circuit Judges. PER CURIAM:

Appellant Cecil R. Arnold ("Arnold") appeals the district court's grant of summary judgment, pursuant to Federal Rule of Civil Procedure 56, in favor of defendant Rayonier, Inc. on his discrimination and retaliation claims, filed pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. He argues that: (1) the undisputed evidence established a prima facie case of age discrimination with respect to the machines/finishing shift supervisor position for which he applied ("2001 position"); (2) the evidence established a continuing violation such that he was not required to file a discrimination charge with the Equal Employment Opportunity Commission ("EEOC")

within 180 days after each of the five rejections by Rayonier; (3) Rayonier violated the ADEA by limiting the pool of applicants it would consider for salaried positions to those it already employed; (4) Rayonier's proffered nondiscriminatory reason - that it only considered current employees for vacant salaried positions - was pretextual because it hired nine outside employees for various other vacant salaried positions; and (5) because a relatively short time period passed between the final judgment in his 1998 trial and Rayonier's first refusal to hire him for a salaried position, he presented a prima facie case of retaliation.

A. Arnold's Age Discrimination Claims

We review de novo the district court's grant of summary judgment, applying the same legal standards as the district court and viewing all the facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. Turlington v. Atlanta Gas Light Co., 135 F.3d 1428, 1432(11th Cir. 1998). "Summary judgment is appropriate only when 'there is no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law.'" Id. (quoting Fed. R. Civ. P. 56(c)).

A person who believes that he has been the victim of age discrimination must file a charge with the EEOC within 180 days of the adverse employment decision if he is in a "non-deferral state." See 29 U.S.C. § 626(d)(l); Grayson v. KMart Corp., 79 F.3d 1086, 1100 (11th Cir. 1996). A "deferral state" is a state that has a law banning age discrimination in employment and that has a state entity authorized to grant or deny relief for such discrimination. Grayson, 79 F.3d at 1100 n. 21. Georgia is not a deferral state. See Delgado v. Lockheed Georgia Co., 815 E2d 641, 646 n.8 (11th Cir. 1987).

The 180-day limitations period does not apply to an employment practice that constitutes a continuing violation. See EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1271 (11th Cir. 2002). Discrete, one-time employment events that should have put a claimant on notice that a cause of action had accrued do not constitute a continuing violation. Such discrete acts include an employer's refusal to hire. See Nat'l R. R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 S.Ct. 2061, 2073, 153 L.Ed.2d 106 (2002); Riccard v. Prudential Ins. Co, 307 F.3d 1277, 1291 (11th Cir. 2002).

Absent direct evidence of an employer's discriminatory motive, a plaintiff can establish unlawful discrimination under the ADEA by establishing a prima facie case of discrimination. The employer must then respond with a legitimate, nondiscriminatory reason for its action. The plaintiff must then establish that the employer's proffered reason was a pretext for unlawful discrimination. Turlington, 135 F.3d at 1432.

"In an ADEA case involving . . . failure to hire, a plaintiff may establish a prima facie case by showing: (1) that he was a member of the protected group of persons between the ages of forty and seventy; (2) that he was subject to adverse employment action; (3) that a substantially younger person filled the position he sought. . ; and (4) that he was qualified to do the job for which he was rejected." Id.

Upon consideration of the record and the parties' briefs, we find no reversible error. With respect to the four positions for which Rayonier rejected Arnold before 2001, Arnold failed to file an EEOC charge within 180 days of each of the denials. Therefore, his claims with respect to those pre-2001 denials were untimely.

With respect to the 2001 position, Arnold failed to raise a genuine issue of material fact as to whether he established a prima facie case of age discrimination because the undisputed evidence showed that Rayonier never permanently filled the 2001 position, and did not continue to seek applications after determining that none of the applicants for the position were qualified. Further, even if Arnold established a prima facie case, Rayonier proffered a legitimate nondiscriminatory reason for not hiring him - namely, that it was only considering current Rayonier employees for the 2001 position - and Arnold failed to present sufficient evidence showing that reason to be a pretext. The undisputed evidence showed that: (1) all the candidates considered for each of the positions for which Arnold applied were Rayonier employees; (2) the HR 4.0 language was part of a standard form used for all vacancy announcements; and (3) the vacancy announcements for each of the positions at issue were all posted at the Mill only. Accordingly, we conclude the district court correctly granted summary judgment on Arnold's discrimination claims.

B. Arnold's Retaliation Claims

We review de nova the district court's grant of summary judgment, applying the same legal standards as the district court and viewing all the facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. Turlington, 135 F.3d at 1432. To establish a prima facie case of retaliation under the ADEA, a plaintiff must show that: (1) he engaged in statutorily protected expression; (2) he suffered an adverse employment action; and (3) the adverse action was causally related to the protected expression. Weeks v. Harden Mfg. Corp., 291 F.3d 1307, 1311 (11th Cir. 2002).

Upon consideration of the record and the parties' briefs, we find no reversible error. Almost 18 months elapsed between Arnold's last "protected activity" (in this case, his appeal of his 1997 discriminatory discharge case to this Court on July 1, 1998), and the first allegedly discriminatory refusal to hire on December 30, 1999. Other than his temporal argument, Arnold pointed to no other evidence showing a causal connection between Rayonier's refusals to hire him and his protected activity.

For the foregoing reasons, we affirm the district court's grant of summary judgment in Rayonier's favor.

AFFIRMED.

Civil Action No. CV201-185

IN THE UNIETD STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

CECIL R. ARNOLD,
Plaintiff,

v.

RAYONIER, INC., and JOHN DOE, INC.,
Defendants.

ORDER

Plaintiff, Cecil R. Arnold ("Arnold"), brings suit against Defendant, Rayonier, Inc. ("Rayonier"), for alleged age discrimination in violation of 29 U.S.C. 621, et seq. Currently before the Court is a Motion for Summary Judgment by Defendant. For the following reasons, the Court will GRANT Defendant' s motion.

Plaintiff's claims stem from his repeated denial of employment with Rayonier. On five occasions since 1999, Plaintiff applied and was rejected for various jobs with Rayonier. In January of 2001, he was rejected for the Machine/Finishing Shift Supervisor position. This was the only rejection which fell within 180 days of the E.E.O.C. complaint filed by Plaintiff on July 5, 2001. Consequently, only this denial of employment may be the basis of an ADEA claim.

Plaintiff's ADEA claim regarding his January 2001 denial. of employment must fail as a matter of law. Plaintiff has not established a prima facie case of discrimination. To establish a prima facie case Plaintiff

must show that: 1) he was between the ages of forty and seventy at the time of the adverse action; 2) he was subject to an adverse employment action; 3) at the time of the adverse action, he was qualified for the position; and 4) the position was filled by a person substantially younger. See Turlington v. Atlanta Gas Light Co., 135 F.3d 1428, 1432 (11th Cir. 1998). The affidavit of Thomas S. Norton states that Rayonier never hired anyone for the Machine/ Finishing Shift Supervisor Position for which Plaintiff applied. (Norton Aff. ¶ 19). Consequently, Plaintiff cannot demonstrate that the position was filled by a person substantially younger than himself.

For the foregoing reasons, the Court hereby GRANTS Defendant's Motion for Summary Judgment.
SO ORDERED, this 26th day of June, 2002.

JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

NO. 02-14127-CC

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CECIL R. ARNOLD,
Plaintiff-Appellant,

v.

RAYONIER, INC., and JOHN DOE, INC.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion_____, 11th Cir., 19, ____F.2d____).

Before ANDERSON, DUBINA and BLACK, Circuit Judges. PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT;

Supreme Court, U.S.
FILED
AUG 1 _ 2003
OFFICE OF THE CLERK

No. 03-28

IN THE

Supreme Court of the United States

CECIL R. ARNOLD,

Petitioner,

v.

RAYONIER INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

GUY O. FARMER II
Counsel of Record
KELLY L. DEGANCE
HOLLAND & KNIGHT LLP
50 North Laura Street, Suite 3900
Jacksonville, FL 32201
(904) 353-2000

Attorneys for Respondent

182098

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED FOR REVIEW

Whether the Eleventh Circuit Court of Appeals properly affirmed the district court's judgment in favor of the Respondent on the basis that:

1) All of the Petitioner's hiring claims, save one, were time-barred, in that Petitioner failed to file a timely administrative charge following the Respondent's rejection of each of his applications, and no continuing violation occurred that would revive the time-barred claims;

2) On the sole hiring claim that was not time-barred, Petitioner's application for the 2001 position, he failed to make a *prima facie* case in that Respondent made a bona fide business decision not to permanently fill the position and was not continuing to seek applicants for the position;

3) Even if Petitioner had made a *prima facie* case, Respondent proffered a legitimate nondiscriminatory reason for not hiring him and Petitioner failed to present sufficient evidence that the reason was a pretext; and

4) Petitioner failed to show that Respondent's refusal to hire him was in retaliation for his having filed an earlier lawsuit against Respondent in that the decision not to hire Petitioner was sufficiently remote in time from the earlier lawsuit so as to refute any causal connection.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Rayonier Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	iv
Statement of the Case	1
Summary of the Argument	7
Reasons for Denying the Petition	9
I. Petitioner Failed To Prove A Continuing Violation So As To Revive His Time-Barred Claims.	9
II. Rayonier Had A Legitimate Business Reason To Limit Its Consideration To Current Employees For The Vacancies For Which The Petitioner Applied.	11
III. Petitioner Failed To Establish A *Prima Facie* Case Of Age Discrimination With Respect To The Machines/Finishing Shift Supervisor Position.	12
IV. Petitioner Failed to Prove that Rayonier's Decision Regarding the January 2001 Position Was in Retaliation For His Earlier Lawsuit.	14
Conclusion	17

TABLE OF CITED AUTHORITIES

Page

Cases:

Balletti v. Sun-Sentinel Co., 909 F. Supp. 1539 (S.D. Fla. 1995) 15-16

Conner v. Schnuck Markets, Inc., 121 F.3d 1390 (10th Cir. 1997) 15, 16

Culley v. Trak Microwave Corp., 117 F. Supp. 2d 1317 (M.D. Fla. 2000) 14, 15

EEOC v. Joe's Stone Crabs, 296 F.3d 1265 (11th Cir. 2002) 10

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 9

Grayson v. K Mart Corp., 79 F.3d 1086 (11th Cir. 1996) 10

Harper v. Blockbuster Entm't. Corp., 139 F.3d 1385 (11th Cir. 1998) 14

Hudson v. Norfolk Southern Ry. Co., 209 F. Supp. 2d 1301 (N.D. Ga. 2001) 15

McDonnell Douglas v. Green, 411 U.S. 792 (1973) 12, 13

Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002) 10

Cited Authorities

	Page
Nealon v. Stone, 958 F.2d 584 (4th Cir. 1992)	9
Nida v. Echols., 31 F. Supp. 2d 1358 (N.D. Ga. 1998)	10
Pollocks v. Sunland Training Ctr., 85 F. Supp. 2d 1236 (N.D. Fla. 2000)	11
Richmond v. ONEOK, Inc., 120 F.3d (10th Cir. 1997)	16
Wascura v. City of S. Miami, 257 F.3d 1238 (11th Cir. 2001)	16
West v. Russell Corp., 868 F. Supp. 313 (M.D. Ala. 1994)	11
Statutes:	
29 U.S.C. § 621, *et seq.*	6
29 U.S.C. § 626(d)(1)	9
42 U.S.C. § 2000e, *et seq.*	6
Rule:	
U.S. Sup. Ct. R. 15.2	1

STATEMENT OF THE CASE

This case arises out of allegations made by the Petitioner, Cecil R. Arnold, ("Petitioner") that the Respondent, Rayonier Inc., ("Respondent" or "Rayonier") discriminated against him based on his age and in retaliation for a previous lawsuit he filed.[1]

Rayonier is a forest products company principally involved in the manufacture of performance fibers and lumber, the management of timberlands and the international marketing of wood products. Petitioner was hired as an hourly employee on June 23, 1969, to work in the Finishing Department at Rayonier's pulp mill in Jesup, Georgia (the "Mill"). Petitioner worked in the Finishing Department at the Mill throughout his tenure (except for two weeks he worked in the Woodyard in 1969 or 1970). Petitioner was promoted in 1976 to a salaried, exempt position as a Finishing Room Foreman. Petitioner worked in that position until his employment was terminated on September 9, 1996, when his position was eliminated as part of an economic reduction in force.

Petitioner, who was forty-six years of age, filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging that his employment was terminated due to his age. He subsequently filed a lawsuit against Rayonier that proceeded to trial in June 1998. The jury returned a verdict in favor of Rayonier, Petitioner appealed, and the Eleventh Circuit Court of Appeals affirmed the verdict ending the case. *See* Pet. App. at 5a.

---

1. Rayonier has provided a thorough Statement of the Case pursuant to Rule 15.2, Rules of the Supreme Court of the United States, because Petitioner's statement is not accurate.

Following the conclusion of that lawsuit, Petitioner applied for five first-level supervisory positions at the Mill. Each of these jobs was only posted internally and Rayonier considered only current employees for the positions. This practice was consistent with Rayonier's normal policy of filling first-line supervisory positions by promoting incumbent hourly employees in order to provide advancement opportunities for those employees. Additionally, this enabled Rayonier to promote individuals within a department who were already familiar with the processes and the employees in that area of the Mill.

The first posted position for which Petitioner applied was Warehouse Area Manager. This job vacancy was posted at the Mill on December 21, 1999. The position was not advertised outside the Mill but Petitioner apparently learned of this vacancy and the others for which he applied because a current employee at the Mill sent him a copy of the posting or orally advised him of it. Petitioner was the only applicant from outside the Mill for this position and for each of the other positions for which he applied.

Petitioner submitted a written application for the Warehouse Area Manager position and also spoke with Jennifer Johnson, the Human Resources Manager ("Johnson"), who advised the Petitioner that he was not eligible to apply for the position because he was not a current employee. Bruce Woodward (DOB: 02/28/54), who was a current employee and who had prior experience working in the Warehouse Department as an hourly employee, an hourly relief supervisor, and as a salaried relief supervisor, was promoted to the Warehouse Area Manager position.

On August 8, 2000, Rayonier posted a Finishing Production Planner position at the Mill directed to internal candidates only. Rayonier posted the position using its standard, pre-printed form for salaried positions, which contained a reference to the Employee Referral Program (HR Practice 4.0) stating that an employee could be awarded $500 for referring an individual for a regular salaried position. However, it is beyond dispute that this statement was included on all postings even when Rayonier was only considering current employees because the pre-printed form, which was used for all job postings, contained that language.

Rather than submitting an application for the Finishing Production Planner position, Petitioner contacted Johnson on August 15, 2000, and was told that he was not eligible to apply for the position because he was not a current employee. During his deposition, Petitioner confirmed that he was not aware of anyone who was not a current employee who was permitted to apply for the position. In fact, there were no other non-employee applicants. Petitioner also testified that, as of August 15, 2000, the date he spoke with Johnson, he understood that he was not going to be considered for the position and he believed Rayonier was discriminating against him. Earl Dent (DOB: 06/22/57), a current hourly employee, was promoted to the Finishing Production Planner position.

On September 1, 2000, Rayonier posted a notice at the Mill that it was seeking to fill a Relief Machines/Finishing Shift Supervisor position. Unlike the earlier positions for which Petitioner applied, this was a relief position. The term relief position refers to Rayonier's use of current, hourly, bargaining unit employees as temporary or relief supervisors. This is a common practice at the Mill and throughout the pulp and paper industry. Petitioner admitted that relief

positions are filled at the Mill by Rayonier's promoting current hourly employees in the same department who then act as supervisors on a temporary basis. Accordingly, there is no question that Rayonier was only seeking applications for the relief position from current hourly employees who were interested in working in the position on a temporary basis as needed.

Even though he realized that Rayonier was only considering current employees for the Relief Machines/ Finishing Shift Supervisor position, Petitioner called Johnson on September 6, 2000, about the job and was told it was a part-time, relief position and he was not eligible because he was not a current employee. Again, Petitioner admitted that he realized when he made the call that he would not be considered for the job, and that he believed at that time that Rayonier's failure to consider him constituted discrimination. Pursuant to its normal practice, Rayonier selected Jerry Frasier (DOB: 11/24/48), an incumbent hourly employee in the Finishing Department who was two years older than Petitioner, for the vacant relief position.

On October 30, 2000, Rayonier posted a vacancy announcement at the Mill for a Warehouse Area Manager position. As with the earlier jobs, this position was not advertised outside the Mill. Petitioner did not submit an application but called Johnson on November 7, 2000, to inquire about the position and was, once again, advised that he was not eligible because he was not a current employee and Rayonier was only considering current employees for the position. Petitioner admitted that as of November 8, 2000, he knew that he was not going to be considered for the position and he believed that, as a result, he was being discriminated against. Rayonier only considered incumbent

employees for the Warehouse Area Manager position and selected Jody Blanton (DOB: 12/09/46), who was four years older than Petitioner.

Rayonier posted a notice for a Machines/Finishing Shift Supervisor position on January 31, 2001. Once again, Rayonier only considered current employees and did not advertise this job outside of the Mill. Petitioner claimed that he sent two applications and also left a message for Johnson on February 6, 2001, but never heard back from her. This was a first-line supervisory position that was vacant because Jody Blanton had moved from this position to the Warehouse Area Manager position. Four current employees applied for the position.

Rayonier interviewed the four current employees and did not consider Petitioner or anyone else from outside the Mill. Following the interviews, Rayonier decided that none of the four applicants fully met its criteria for the salaried position. Therefore, rather than promoting someone who might not succeed, Rayonier decided to indefinitely delay permanently promoting anyone to the position. Rayonier decided, instead, to fill the position by temporarily promoting hourly employees to the position until it decided to permanently fill the position. The incumbent hourly employees who had been temporarily promoted to work in this job at the time when Rayonier filed its motion for summary judgment were: Gary Blanton (DOB: 08/15/61); Al Copeland (DOB: 01/25/60); Jerry Frasier (DOB: 11/24/48); Jay Jacobs (DOB: 09/26/66); William Milledge (DOB: 03/31/47); Robby Poppell (DOB: 08/16/61); Tony Batten (DOB: 04/23/49); and Keith Vanderveen (DOB: 11/05/66). Three of these individuals were older than Petitioner (DOB: 05/11/50).

On July 5, 2001, Petitioner filed a charge of discrimination with the EEOC. In response, the EEOC, without investigating the charge, issued a dismissal and a notice of a right-to-sue. Petitioner then filed his Complaint in the district court. In the Complaint, Petitioner alleged that he had applied for numerous positions with Rayonier since September 9, 1996, but was repeatedly denied employment due to his age and in retaliation for having earlier filed a lawsuit against Rayonier. Petitioner claimed that Rayonier's conduct violated both the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). The Title VII claim was dismissed by the district court early in the case and Petitioner did not appeal that Order. Accordingly, the Title VII claim is not discussed in this Response.

On May 10, 2002, Rayonier filed a motion for summary judgment seeking to dismiss Petitioner's ADEA claims. On June 26, 2002, the district court granted the motion ruling that Petitioner had failed to comply with the administrative prerequisites necessary to file a suit under the ADEA with regard to four of the alleged failures by Rayonier to offer him a position in that he did not file a charge of discrimination with the EEOC within 180 days of the alleged discriminatory actions. Accordingly, the court ruled that only the January 2001 failure to hire claim survived. The court further determined that Petitioner had failed to make a *prima facie* showing of discriminatory failure to hire with respect to that position because he had not shown that it was filled by a substantially younger individual since Rayonier had chosen not to permanently fill the position.

Petitioner appealed the district court's order and the Eleventh Circuit Court of Appeals affirmed. In doing so, the court of appeals concluded that all of Petitioner's claims, except for the claim for the January 2001 position, were barred and ruled that there was no continuing violation. The court of appeals also decided that, since Rayonier did not permanently fill the January 2001 position nor did it continue to seek applicants for that position, Petitioner had failed to establish a *prima facie* case of age discrimination. In addition, the court of appeals ruled that even if Petitioner had made a *prima facie* showing, Rayonier had provided a legitimate and nondiscriminatory reason for refusing to consider him. Finally, the court of appeals ruled that Petitioner's retaliation claim also lacked merit in that the time that had elapsed between the end of Petitioner's earlier lawsuit and Rayonier's decision not to consider him for a job vacancy negated any causal connection between those events.

Petitioner then filed a timely Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

Rayonier submits that the district court properly granted summary judgment in its favor and the court of appeals correctly affirmed that decision. Both courts correctly applied well settled principles of law to clearly-established facts. No further appellate review is warranted and this Court should, therefore, deny the Petitioner's Petition for Writ of Certiorari.

The court of appeals correctly concluded that Petitioner's claims related to the four positions for which he submitted

applications prior to 2001 were untimely because Petitioner failed to file a charge with the EEOC within 180 days after he understood that Rayonier was not going to consider him for the positions and believed that the decision constituted unlawful discrimination. In so ruling, the court of appeals correctly rejected Petitioner's argument that Rayonier's refusals to hire him constituted a continuing violation.

With regard to the January 2001 position for which Petitioner made a timely claim, the court of appeals properly concluded that Petitioner failed to establish a *prima facie* case of age discrimination because Rayonier did not permanently fill the position and did not continue seeking applicants. Even if Petitioner had established a *prima facie* case, the court of appeals ruled that Rayonier established a legitimate and nondiscriminatory reason for not hiring him. Specifically, the court ruled that Rayonier established that it had a legitimate business reason that was not related to age to limit its consideration for that position to current employees and Petitioner failed to show that Rayonier's reason was a pretext for age discrimination. Finally, the court of appeals correctly ruled that Petitioner's retaliation claim was properly dismissed by the district court in that, because of the length of time between the Petitioner's earlier lawsuit and Rayonier's rejection of his 2001 application, Petitioner did not establish a causal connection necessary to support a retaliation claim.

REASONS FOR DENYING THE PETITION

I. Petitioner Failed To Prove A Continuing Violation So As To Revive His Time-Barred Claims.

Although Petitioner has not raised a continuing violation argument as a separate issue in the Petition, he does contend in his Statement of the Case that this Court should consider the fact that he applied for and was rejected for five positions as establishing a pattern or continuing act of discrimination by Rayonier. Accordingly, Rayonier will address this as a separate issue.

In essence, Petitioner argues that the continuing violation doctrine should apply to revive his time-barred claims. His argument is not well taken for two reasons. First, Petitioner failed to raise this issue before the district court. He has, therefore, waived this argument and can not now raise it. *See Nealon v. Stone,* 958 F.2d 584, 590 n.4 (4th Cir. 1992). Moreover, well-established Supreme Court decisions and the court of appeals decision in this case make it clear that there was no continuing violation.

It is well settled that in order to pursue a judicial remedy for an alleged violation of the ADEA in a non-deferral state, a plaintiff must have filed a charge of discrimination with the EEOC within 180 days from the time the alleged unlawful practice occurred. *See* 29 U.S.C. § 626(d)(1); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27 (1991) (to maintain suit under the ADEA, plaintiff must first file EEOC charge). Georgia is a "non-deferral state" in that it has no state law banning age discrimination in employment nor does it have a state entity authorized to grant or to seek relief for victims of such discrimination.

Grayson v. K Mart Corp., 79 F.3d 1086, 1100 n.21 (11th Cir. 1996). Therefore, a plaintiff in Georgia must file a charge with the EEOC within 180 days of the alleged discriminatory act. Failure to do so bars the claimant from pursuing a civil action for that claim. *See Nida v. Echols*, 31 F. Supp. 2d 1358, 1365 n.8 (N.D. Ga. 1998).

Because Petitioner did not file an EEOC charge until July 5, 2001, anything that occurred prior to January 6, 2001, could not be considered by the district court. The result was that the only job for which Petitioner applied that could be used as a basis for his claim was the Machines/Finishing Shift Supervisor position for which he applied in January 2001.

Accordingly, the district court and the court of appeals correctly precluded Petitioner's pre-2001 claims as untimely. In addition, the court of appeals noted that discrete acts or one-time employment events are not subject to the continuing violation doctrine. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002). In *Morgan*, this Court ruled: "Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire" are not actionable if time-barred, even when they are related to acts alleged in timely filed charges, thereby eliminating application of the continuing violation doctrine to claims involving discrete acts. *Id.* In *EEOC v. Joe's Stone Crabs*, the Eleventh Circuit Court of Appeals adopted *Morgan* ruling that failure to hire claims "were discrete, one-time employment events that should have put the claimants on notice that a cause of action had accrued." 296 F.3d 1265, 1272 (11th Cir. 2002).

The decision of the court of appeals in this case, as well as Supreme Court and existing Eleventh Circuit case law,

lead to the clear conclusion that each of Petitioner's failure to hire claims was a separate, distinct act that should have put Petitioner on notice or alerted him to the fact that he was being discriminated against. Moreover, each of these separate events triggered Petitioner's obligation to file a claim with the EEOC. In fact, Petitioner admitted during his deposition that each time Johnson, as a representative of Rayonier, advised him that he would not be considered for the position, he believed that he was being discriminated against by Rayonier. Clearly, once the Petitioner knew he had been rejected and expressed a belief that this was a violation of his rights, his legal duty to file a charge regarding that position arose. His failure to do so within 180 days resulted in those claims being barred. Accordingly, the district court properly rejected the application of the continuing violation theory in this case and the court of appeals correctly affirmed that conclusion.

II. Rayonier Had A Legitimate Business Reason To Limit Its Consideration To Current Employees For The Vacancies For Which The Petitioner Applied.

Petitioner argues that Rayonier violated his rights under the ADEA by limiting its consideration for the positions for which he applied to current employees. However, numerous courts disagree and have found an employer's preference for internal candidates is a legitimate, nondiscriminatory reason. *See West v. Russell Corp.*, 868 F. Supp. 313, 318 (M.D. Ala. 1994) (noting that employers giving extra consideration to a candidate due to his status as a current employee is "clearly a legitimate basis for an employer to make such a decision"); *Pollocks v. Sunland Training Ctr.*, 85 F. Supp. 2d 1236, 1248-49 (N.D. Fla. 2000) (noting that an employer giving preference to current employees would constitute a legitimate, nondiscriminatory reason and finding that such a

reason was not pretextual as it was an "objectively verifiable preference[]"). Accordingly, it is clear that Rayonier's preference for current employees was not a violation of the law; rather, it was a legitimate business decision based on reasons clearly not related to age or Petitioner's earlier lawsuit against Rayonier.

The fact that Petitioner was the only applicant for these positions who was not a current employee does not alter this conclusion. Rayonier's having limited its consideration to current employees was clearly not an attempt to avoid hiring applicants over the age of forty. In fact, two of the current employees that Rayonier permanently selected for the five positions for which Petitioner applied were older than Petitioner. Additionally, three of the incumbent hourly employees who were used to temporarily fill the January 2001 position were older than Petitioner. Accordingly, the decision of the district court as affirmed by the court of appeals that Rayonier did not violate Petitioner's rights when it limited those it considered for the positions to current employees was clearly consistent with the law and should not be overturned.

III. Petitioner Failed To Establish A *Prima Facie* Case Of Age Discrimination With Respect To The Machines/Finishing Shift Supervisor Position.

Petitioner relies primarily on *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), to argue that it is not necessary that a vacant position be filled by a younger individual in order to establish a *prima facie* case of discrimination. Indeed, Petitioner argues that a plaintiff may show either that someone outside the protected class, meaning, in this case, someone significantly younger than Petitioner, was hired or

that the employer left the position open and continued seeking "applicants from persons of complainant's qualifications." *Id.* at 802.

In this case, however, for the only position for which Petitioner applied where his claim was not time-barred, the January 2001 Machines/Finishing Shift Supervisor position, Rayonier did not permanently fill the position and did not continue to seek applicants. Rather, it began using current hourly employees to "set-up" into the vacant position on a temporary basis. Rayonier presented evidence that this was consistent with its long-standing, legitimate business practice. Additionally, in this case, current employees who were both older and younger than Petitioner were used by Rayonier to fill the temporary position. Therefore, it is clear that no inference of age discrimination could be drawn.

In addition, even assuming that Rayonier continued to attempt to permanently fill the Machines/Finishing Shift Supervisor position, Petitioner presented no evidence establishing that Rayonier was seeking "persons of complainant's qualifications." *Id.* Instead, the undisputed evidence shows that Rayonier limited its consideration to current employees; since Petitioner was not a current employee, he was not qualified for the position. Accordingly, Petitioner clearly failed to satisfy the fourth element of a *prima facie* case under *McDonnell Douglas* in that he failed to show that Rayonier continued seeking applications from candidates with the same qualifications as Petitioner. Although he never directly argues the point, the Petitioner appears to be contending that, because he had previously worked at the Mill, he should have been considered by Rayonier as though he were a current employee when the selections were made. However, there is no legal authority

for this proposition, and, therefore, it was properly not considered by either the district court or the court of appeals.

In sum, it is evident that Petitioner failed to make a *prima facie* case of discriminatory failure to hire with respect to the Machines/Finishing Shift Supervisor position. As a result, the district court's ruling granting Rayonier's motion for summary judgment was correctly affirmed by the court of appeals.

IV. Petitioner Failed to Prove that Rayonier's Decision Regarding the January 2001 Position Was in Retaliation For His Earlier Lawsuit.

In order to show a *prima facie* case of retaliatory failure to hire, Petitioner must have shown that: (1) he had engaged in statutorily protected activity; (2) Rayonier had subjected him to an adverse employment action; and (3) a causal connection existed between the protected activity and the adverse action. *See Culley v. Trak Microwave Corp.*, 117 F. Supp. 2d 1317, 1321-22 (M.D. Fla. 2000) (citing *Harper v. Blockbuster Entm't. Corp.*, 139 F.3d 1385, 1388 (11th Cir. 1998)).

In this case, Petitioner did not make a sufficient showing to satisfy either the second or third elements of the *prima facie* case for retaliation. With respect to the only claim that was not time-barred, Petitioner's claim that he should have been hired for the January 2001 Machines/Finishing Shift Supervisor position, Petitioner clearly did not show that he was subjected to an adverse employment action. Rayonier did not hire anyone for that position nor did it continue seeking applicants for the position. Accordingly, Petitioner could not show that Rayonier's failure to hire him constituted

an adverse employment action. *See Culley,* 117 F. Supp. 2d at 1322 ("Because Trak did not hire anyone for the [position at issue], Culley cannot establish that Trak's failure to hire *him* constitutes an 'adverse employment action.'"). Therefore, Petitioner clearly did not show that he suffered an adverse employment action sufficient to make a *prima facie* showing of retaliatory failure to hire.

Even assuming that Rayonier's decision not to fill the 2001 position constituted an adverse employment action, Petitioner did not satisfy the final element of the *prima facie* case by showing a causal connection between his protected activity and the failure to hire him. As the court of appeals concluded in affirming the district court's Order granting Rayonier's motion for summary judgment:

> Almost 18 months elapsed between Arnold's last 'protected activity' (in this case his appeal of the 1997 discriminatory discharge case to this Court on July 1, 1998), and the first allegedly discriminatory refusal to hire on December 30, 1999. Other than his temporal argument, Arnold pointed to no other evidence showing a causal connection between Rayonier's refusals to hire him and his protected activity.

Pet. App. at 5a; *see Hudson v. Norfolk Southern Ry. Co.*, 209 F. Supp. 2d 1301, 1339 (N.D. Ga. 2001) ("A seven-month, or even five-month lapse of time is too lengthy to support an inference of cause-and-effect by itself.") (citing *Conner v. Schnuck Markets, Inc.*, 121 F.3d 1390, 1395 (10th Cir. 1997)) ("four-month gap between protected activity and termination not sufficient to justify an inference of causation."); *Balletti v. Sun-Sentinel Co.*, 909 F. Supp. 1539, 1548 (S.D.

Fla. 1995) (plaintiff's internal complaint followed six months later by her termination, "was not temporally close enough to support an inference of causal connection.").

The court of appeals also adopted similar reasoning in an earlier case, *Wascura v. City of South Miami,* 257 F.3d 1238, 1244-45 (11th Cir. 2001), where it examined the issue of causal connection at the pretext stage and noted:

> While a close temporal proximity between two events may support a finding of a causal connection between those two events, the three and one-half month period between Wascura's notification to the Commissioners of her son's illness and her subsequent termination does not, standing alone, show that the City's articulated reasons for her termination were pretextual.

Wascura, 257 F.3d at 1244-45 (internal citations omitted) (citing *Conner,* 121 F.3d at 1395 (four-month lag insufficient to show causal connection)); *Richmond v. ONEOK, Inc.,* 120 F.3d 205, 209 (10th Cir. 1997) (three month lag, standing alone, is not sufficient to establish causal connection).

Clearly, Petitioner, in this case, failed to establish a *prima facie* showing of a retaliatory failure to hire and, accordingly, the court of appeals affirmation of the district court's Order granting Rayonier's motion for summary judgment on Petitioner's retaliation claim should be permitted to stand by this Court.

CONCLUSION

For the foregoing reasons, Rayonier respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

GUY O. FARMER II
Counsel of Record
KELLY L. DEGANCE
HOLLAND & KNIGHT LLP
50 North Laura Street, Suite 3900
Jacksonville, FL 32201
(904) 353-2000

Attorneys for Respondent